

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0081012782:

JOCELYN NELSON,)	Case No. 114-2009
)	
Charging Party,)	
)	
vs.)	HEARING OFFICER'S DECISION
)	AND PROTECTIVE ORDER
CITY & COUNTY OF)	
BUTTE-SILVER BOW,)	
)	
Respondent.)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Jocelyn Nelson filed a complaint with the Department of Labor and Industry on December 20, 2007, alleging that the City and County of Butte-Silver Bow, her former employer, discriminated against her in employment in retaliation for her internal complaint of a hostile work environment. On July 24, 2008, the department issued notice that Hearing Officer Terry Spear would preside over the contested case hearing on the complaint.

The hearing proceeded on December 8-11, 2008, in Butte, Montana. Nelson attended with counsel Patrick T. Fleming, Fleming & O'Leary, PLLP. BSB attended through its designated representative, Tim Clark, BSB's Director of Human Resources, with counsel, Thomas M. Welsch, Poore, Roth & Robinson, PC.

Nelson, Timothy C. Clark, Lynda Brown, Linda Susan Sajor-Joyce, Jeff Amerman, Paul David Babb, Rick Soto, Dannette Harrington and Eileen Joyce testified. Specific portions of the evidentiary record were sealed and kept out of the public record. Exhibits 2, 7 (pages 36-37, 40-41 and 61-66), 8 (in its entire 7 pages, pages 1-5 redacted to protect personal information), 11 through 13, 16, 18, 27, 29, 30, 104 through 105, 108 through 109, 116, 136, 141, 142 and 144 were admitted into the public record. Exhibits 7 (pages 19 through 28) and 143 were offered and refused, and are part of the public record. Exhibits 1, 5, 9, 10, 17, 19, 20, 32 (for limited purposes), 139 (all subparts) and 140 (all subparts) were sealed and admitted outside the public record. Continuing objections and motions to strike were allowed, and are addressed herein.

After the close of the hearing, BSB filed an affidavit from Clark, correcting his testimony about prior step four grievance proceedings and Nelson filed a portion of

the deposition testimony of Deputy County Attorney Joyce regarding Nelson signing the name of a job applicant on the application, with the applicant's permission. The Hearing Officer now accepts both filings and uses them to augment the evidentiary record. The Hearing Officer also grants BSB's post hearing motion to add seven lines of Nelson's testimony at deposition (page 88, lines 2-8) to the record.

The Hearings Bureau received the last post hearing filing on March 3, 2009. The Hearings Bureau file docket accompanies this decision.

II. ISSUES

The key issue in this case is whether BSB's disciplinary action and subsequent discharge of Nelson were in retaliation for her complaint regarding a coworker's postings. Because the analyses of any complaints of sex discrimination in employment involve the same facts, the Hearing Officer addresses any such claims in conclusory fashion at the end of the decision herein. A full statement of the issues appears in the final prehearing order.

A secondary issue has arisen regarding what portions of the sealed record should remain sealed after the decision. This order also addresses and resolves that secondary issue.

III. FINDINGS OF FACT

1. Respondent City and County of Butte-Silver Bow (BSB) hired charging party Jocelyn Nelson on July 24, 2006, as a Personnel Technician in BSB's Human Resources Department. Her immediate supervisor was Tim Clark, Director of Human Resources. Nelson successfully completed her probationary period prior to any of the events relevant to the charges in this case.

2. In pertinent part, Nelson's educational background included a Master's Degree in Political Science from the University of Montana in 2002. She had taken and completed all of the classes offered and available at the University of Montana in the human resources field.

3. Nelson and a male payroll technician in the payroll department developed a running disagreement at work. The payroll technician, who had worked in that position for BSB since 1988, will hereafter be called "BSB Employee No. 1." The nature of their job duties required that Nelson and BSB Employee No. 1 frequently cooperate in performing their jobs, to assure that personnel and payroll records were accurate for BSB employees. Nelson was not the only fellow employee with whom BSB Employee No. 1 had clashed over his years at BSB, but the ongoing conflicts between these two employees limited their ability to cooperate in completing the work and their interactions were strained. They blamed each other for their disputes.

4. Prior to the events at issue in this retaliation charge, Nelson had complained to Clark about BSB Employee No. 1. In her hearing testimony she stated that BSB Employee No. 1 had made sexist comments and derogatory comments about women. However, she testified that her initial "formal complaint" to Clark was about BSB Employee No. 1's false claims of not receiving payroll information that Nelson had provided and that she asked Clark for "assistance in facilitating . . . some kind of – a better way to – for us to work together." The evidence does not prove that before the pertinent events for this case, in March 2007, Nelson had formally complained to BSB about sexual harassment or a hostile working environment caused by BSB Employee No. 1's comments and actions derogatory toward women.

5. Clark and Jeff Amerman, Budget Director for BSB and direct supervisor of BSB Employee No. 1, attempted unsuccessfully to improve the working relations between Nelson and BSB Employee No. 1. At some point during those efforts, Clark directed Nelson not to communicate with BSB Employee No. 1 by e-mail, because e-mail exchanges between them appeared to Clark to cause or to intensify their disagreements. Nelson continued to report her issues with BSB Employee No. 1 to both Amerman and Clark.

6. For some time prior to March 2007, BSB Employee No. 1 had been posting cartoons, jokes and signs on his office door. He had never received any complaints about his postings, and no one had complained to Clark about the posted material.

7. On March 13, 2007, Nelson saw¹ that BSB Employee No. 1 had signs on his office door which she reasonably considered offensive, inappropriate and demeaning to females. That same day she sent a courteous e-mail to BSB Employee No. 1 asking him to remove the offensive signs.² BSB Employee No. 1 sent back a hostile e-mail, refusing to remove his signs.

8. On March 14, 2007, BSB Employee No. 1 confronted Nelson in her office and shouted at her about her e-mail to him regarding the signs. That same day, Amerman sent BSB Employee No. 1 an e-mail (copy to Clark)³ suggesting either that BSB Employee No. 1 remove the signs offensive to another employee (Nelson) or "appeal to higher authority in defense of material you have posted."

¹ Whatever signs she saw sooner, Nelson first complained about signs on March 13, 2007.

² Nelson believed that Clark's directions that she not send e-mails to BSB Employee No. 1 were no longer in effect.

³ Nelson testified that she believed she told Clark about the signs on the 13th, and that she sent the e-mail to BSB Employee No. 1 on the 13th because Clark had already left for the day. Either way, Clark had notice of Nelson's objection to the signs at least by the 14th.

9. Later on the 14th, Clark responded to Amerman, advising that some or all of BSB Employee No. 1's signs violated BSB's work rules regarding posting of "items of an offensive nature" in their work areas. Clark suggested to Amerman that it would be best for BSB Employee No. 1 to take down his signs immediately.

10. On March 15, 2007, Amerman sent an e-mail to BSB Employee No. 1 requesting immediate removal of the signs, which were removed the next day.

11. On March 20, 2007, BSB Employee No. 1 was disciplined, both for posting the signs and for his responses to Nelson regarding her request that he remove his signs. A write-up documenting the discipline (which consisted of counseling by Amerman) was placed in his personnel file. In accord with BSB policy, if BSB Employee No. 1 received no further discipline within three months, the documentation would be removed from his personnel file at his request.

12. After the incident involving the signs posted by BSB Employee No. 1, BSB hired an outside consulting firm, Personnel Plus! Consulting Services, Inc., to review the circumstances involved in all of the ongoing disputes between Nelson and BSB Employee No. 1 and to make recommendations to BSB. Nelson knew that BSB had hired Personnel Plus! and understood its assignment included submitting a report to BSB with "problem-solving" recommendations. She expected that the report would vindicate her insistence that BSB Employee No. 1 was the cause of the ongoing problem.

13. Jim Nys and Kristina Loftis of Personnel Plus! interviewed a number of employees, including Nelson and BSB Employee No. 1, in undertaking the review. The interviews took place in early May 2007. Following the interviews, Nelson made periodic inquiries to Clark about the status of the report.

14. Nelson's work performance suffered in May and June 2007, during which time she was experiencing some marital problems. She was behind in completing her work, including getting minutes out for various boards and committees. Clark did not take any disciplinary action against Nelson, although he began to remind her of the importance of catching up on her work.

15. On June 13, 2007, Personnel Plus! finished its review and submitted its recommendations in a report to BSB. The report included a summary of events and a number of suggestions for changes in handling of the disputes in the future. The summary and the suggestions could be read, in part, as criticisms of BSB's management practices in the past, perhaps vindicating Nelson's complaints about BSB Employee No. 1. The suggestions also addressed personnel practices extending beyond dealing with disputes between Nelson and BSB Employee No. 1. The consulting firm marked each page of the report "confidential."

16. Linda Sajor-Joyce was BSB's Management Information Services Director (computer services director). At approximately the same time as BSB received the report, Sajor-Joyce was directed to undertake a search and retrieval of certain electronic messages from BSB's computer system (e-mails and cell phone text messages between Nelson and BSB's Economic Development Director, hereafter called "BSB Employee No. 2.")

17. The date Sajor-Joyce received the assignment was not proved, but it necessarily occurred on or before June 20, 2007, the date upon which she began printing the messages she had retrieved (*see* Finding No. 19).

18. BSB Employee No. 2's office was located outside the BSB Courthouse where Nelson worked, and his e-mail system used a different domain from that used by BSB within the courthouse. Because of technical details involved in retrieving electronic communications between the BSB domain utilized at the courthouse, through which Nelson received and sent e-mail, and "outside" domains, which included BSB Employee No. 2's e-mail domain, Sajor-Joyce could only retrieve some of the electronic messages between BSB Employee No. 2 and Nelson. She retrieved e-mail messages sent to Nelson by BSB Employee No. 2. Whenever a message from BSB Employee No. 2 to Nelson was a response to a message from Nelson, Sajor-Joyce could retrieve the original message from Nelson with the response from BSB Employee No. 2. Sometimes there were "strings" of messages back and forth between the two employees when an initial message from either prompted a multiple message e-mail exchange. Whenever an e-mail message from either employee prompted such exchanges, the entire "string," from the initial message through the last message from BSB Employee No. 2, was retrieved. E-mail messages from Nelson to BSB Employee No. 2 to which BSB Employee No. 2 did not respond were not retrieved. Sajor-Joyce was also unable to retrieve any cell phone text messages sent by Nelson, only cell phone text messages sent by BSB Employee No. 2 to Nelson's BSB e-mail address.

19. On June 20-21, 2007, according to the footer on each page of sealed exhibits 139 and 140, Sajor-Joyce printed the text and e-mail messages she retrieved, at which point the messages were available for BSB management's review.

20. The retrieved messages documented that by early 2007, Nelson and BSB Employee No. 2 were engaging in extensive personal electronic communications, using BSB's communication systems, in which they inappropriately expressed personal attraction to and feelings for each other and inappropriately discussed some work-related situations, including Nelson's conflicts with BSB Employee No. 1. Both participants knew that these electronic communications were in violation of BSB's policies regarding the use of its communication systems.

21. Nelson's job duties included preserving and maintaining employee personnel files, including employee discipline records. Clark told Nelson to remove the March 20, 2007, write-up from BSB Employee No. 1's file, presumably after BSB Employee No. 1 made a timely request for such removal. Nelson wrote a note objecting to removing the write-up. Clark responded in writing, requiring that she remove it. She did. This interaction must have occurred on or after June 20, 2007, the three-month anniversary of BSB Employee No. 1's write-up.

22. On June 22, 2007, Chief Executive Paul Babb sent a memo to all employees stating that "several incidents of e-mail and cell phone abuse have been reported in the past month," and also stating that "I have asked the MIS Director [Sajor-Joyce] to begin monitoring e-mail and report abuses to Department Heads and Elected Officials on a quarterly basis."

23. The evidence presented did not explain why BSB commenced its scrutiny of "e-mail and cell phone abuse" by looking at communications between Nelson and BSB Employee No. 2. The evidence at hearing also did not specify the particulars of the reports to BSB of e-mail and cell phone abuse, such as when, by whom and to whom the reports were made.

24. Sajor-Joyce recalled that Babb's memo was prompted by her retrieval of the e-mails and text messages between Nelson and BSB Employee No. 2, and one other case that involved "abuses of government equipment." Sajor-Joyce did not state whether the other case involved inappropriate use of e-mail and text messaging. She did not recall subsequently undertaking quarterly reviews of e-mails and text messages and did not recall ever doing any other e-mail and text mail retrievals other than the one involving Nelson and BSB Employee No. 2.

25. Clark reviewed the retrieved text and e-mail messages. He reasonably concluded that many of the messages were personal rather than work-related and that many of the messages were not proper for BSB's workplace communication network. His conclusions applied to messages authored by BSB Employee No. 2 and to messages authored by Nelson. Babb, who also reviewed the messages, agreed with Clark's conclusions.

26. Clark had a more specific concern regarding one e-mail message authored by Nelson and dated March 2, 2007, eleven days before the commencement of the dispute over BSB Employee No. 1's signs. Nelson's March 2 e-mail read:

For what its [sic] worth, my vacation was wonderful. I was ready to walk when I left. Now, I am rejuvenated and prepared to conduct war with certain individuals who waged such against me just prior to my departure. I am quickly realizing who is and who is not in our camp. I have ammo and feel totally regenerated. I

am actually looking forward to watching certain individuals squirm in the near future.

27. Clark concluded that Nelson was willing to use, and might already have used, confidential personnel information for personal purposes, in her ongoing conflicts with BSB Employee No. 1 or otherwise. He concluded that he could not trust her with confidential personnel information, and therefore should not keep her in her current position.

28. Neither Clark nor anyone else acting on behalf of BSB ever asked Nelson what she meant by her March 2, 2007, e-mail. At hearing, Nelson never testified to what she meant by the e-mail, except to admit that "certain individuals" referred to BSB Employee No. 1. She did not explain her statement that she had "ammo" and was "looking forward to watching certain individuals [BSB Employee No. 1] squirm in the near future."

29. There was no credible evidence that Nelson ever improperly used confidential personnel information. Nonetheless, Clark's interpretation of the e-mail message was reasonable. In light of his interpretation, his conclusion that he could not trust Nelson in her current position was worthy of credence.

30. Babb and Clark met with BSB Deputy County Attorney Eileen Joyce, to discuss possible disciplinary action against both Nelson and BSB Employee No. 2 regarding the text and e-mail messages. The exact timing is unclear, but since Joyce reviewed copies of the messages, the meetings and discussions must have occurred on or after June 21, 2007, the second of the two dates upon which the text and e-mail messages were printed by Sajor-Joyce.

31. The participants in those meetings and discussions generally agreed with Clark's concern about Nelson's apparent willingness to use confidential personnel information in battles with co-employees.

32. BSB consulted a private law firm about appropriate discipline of Nelson and BSB Employee No. 2. Copies of the text and e-mail messages but not of the Personnel Plus! report were provided to the law firm. The consultation occurred between June 21 and June 29, 2007 (*see* Finding Nos. 30 and 35).

33. On June 29, 2007, at 10:01 a.m., Nelson sent Clark an e-mail inquiry about the status of the consulting firm's problem-solving report.

34. Clark responded on June 29, 2007, with a handwritten note left in Nelson's mail slot, which is in the public record, and which stated, in its entirety:

With respect to your e-mail of today's date, Mr. Nys' report has been received and Jeff and I are going to meet early next week to review his recommendations.

Mr. Nys made several recommendations, some of which are specific to the issues between yourself and Rick and some of which deal generally with appropriate workplace communications and posting of materials within Butte-Silver Bow facilities.

Once Jeff and I meet regarding the report, it is our intent to meet either as a group or individually to review the recommendations which are appropriate to your situation. In the meantime, I would suggest the following.

- (1) that you continue to communicate with Rick on issues relative to payroll and human resources and that the communications reflect the professionalism expected of your position.
- (2) that if you are still experiencing problems with Rick, that you reduce such to a written report to me utilizing specific instances and/or examples.

With respect to No. 2 above, I think it appropriate that since you have not been able to catch up on several items given to you over the past month, that you will prepare the report on non Butte-Silver Bow time.

35. On June 29, 2007, the private law firm advising BSB regarding discipline of Nelson and BSB Employee No. 2 hand-delivered a letter responding to BSB's inquiry, which Clark and Babb reviewed that same day.

36. In the letter, the law firm recommended, based upon its review of the information it had regarding Nelson and BSB Employee No. 2, that both parties to the messages be suspended without pay for 3-5 days, that BSB Employee No. 2's position be restructured for different and closer supervision with his management responsibilities removed, and that Nelson not be returned to her personnel position after her suspension. The law firm also recommended that after their unpaid leaves both employees be put on administrative leave with pay, BSB Employee No. 2 until his job could be restructured and Nelson until she could be found another position.

The law firm's letter also specifically addressed treating Nelson more harshly than BSB Employee No. 2:

We are mindful of the danger inherent in appearing to treat her differently from [BSB Employee No. 2] . . . but we feel Ms. Nelson's apparent willingness to misuse confidential information indicates a very serious problem with her suitability for positions with access to such information. We understand the difficulty involved in attempting to find another position for her, but we think it critical that the reputation of the Personnel Department and its personnel not be tarnished or compromised in any way.

37. On Friday, June 29, 2007, Babb and Clark conferred, in light of the facts and the recommendations of counsel, and decided upon the disciplinary actions to take against Nelson and BSB Employee No. 2.

38. On July 29, 2007, Clark and Babb met with Nelson and told her she would be placed on unpaid administrative leave for July 2, 3, 5, and 6 for her personal misuse of the e-mail system, a violation of BSB's policies. They also told her that thereafter she would be placed on paid administrative leave while BSB attempted to find a job for her outside the personnel department. When Nelson asked why, she was told that the concerns arose out of the e-mails between BSB Employee No. 2 and her. Clark told her that he did not feel he could trust her because she had violated policies. Clark also told Nelson that she could grieve the decision under BSB's grievance policy and would receive written confirmation of the disciplinary action being taken.

39. On July 2, 2007,⁴ Clark sent to Nelson a letter confirming her suspension, advising that she was "suspended without pay for the dates of July 2, 3, 5 and 6, 2007," and that she would then be "placed on administrative leave with pay until further notice."

40. Babb sent a July 2, 2007, letter to BSB Employee No. 2, confirming that he was suspended without pay for the same four work days, thereafter to be put on administrative leave with pay.

41. On July 9, 2007, Nelson sent a letter to Clark requesting copies of two BSB policies regarding electronic mail and user responsibilities and a copy of BSB's grievance policy. She also requested copies of the e-mail "correspondence" in which BSB charged that she had violated its policies. Her letter did not state that it was a grievance. The entirety of the final paragraph of the letter stated:

⁴ Nelson testified that she did not receive the letter until July "10th, possibly the 12th." The exact date she received the letter is not of particular importance for this decision.

I look forward to hearing the response made on behalf of Butte-Silver Bow and receiving the requested documents in a timely manner. My attorney will be in contact with you and you may address all correspondence to him from this time forward.

42. Clark did not consider this letter to be a grievance. He did not respond within the 10 days after receipt of a grievance by which the immediate supervisor of a grievant was to respond in writing, completing the first step of BSB's grievance procedure.

43. According to the procedure, failure of BSB timely to act on any step entitled the grievant to proceed to the next step: "If the government misses a step, the grievant may proceed to the next appropriate step of the procedure." Nelson did not take the second step of the grievance procedure and submit her grievance to Babb, the chief executive.

44. BSB reinstated BSB Employee No. 2 to his former position either immediately after his unpaid leave or within days after commencement of his paid leave, and began to implement modifications to both the supervision he received and the duties of his position. Babb did not feel that BSB Employee No. 2's misuse of the e-mail system indicated that he could not trust BSB Employee No. 2 appropriately to handle his position or information to which he had access in his position. In addition, BSB Employee No. 2 was responsible for work necessary to complete important pending BSB projects.

45. Babb began overseeing BSB Employee No. 2's work more closely, meeting with him on a day-to-day basis, which had not been his previous practice. Babb also embarked upon restructuring the Economic Development Department, ultimately moving it into the Community Development Department. During the course of that restructuring, BSB Employee No. 2 left the employ of BSB.

46. BSB did not reinstate Nelson to her former position after her unpaid leave. She was placed on administrative leave with pay while BSB looked for another position into which she could be placed.

47. Nelson was not the first BSB employee unable to continue in an assigned job. In the past, when required by settlement of a court case or with the approval of the County Attorney, BSB had found positions for employees displaced from their existing positions. In some instances that action had triggered union grievances and caused unrest among bargaining unit members. In none of the instances proved at hearing had the particular employee been displaced because the immediate supervisor had lost trust in the employee's willingness properly to perform job duties.

48. Clark was responsible to search for another position into which BSB could place Nelson. He searched by looking at the job descriptions for positions that came open with BSB to see if Nelson both was qualified to be placed in the positions and could be placed in them without undue problems.

49. Most BSB clerical positions outside of personnel were within collective bargaining units. The collective bargaining agreement for those units required internal posting of open clerical positions, for applications from other qualified union members. When a clerical position opened, it was first posted for qualified union members, already employed by BSB, who could transfer into the open position. Assigning a nonunion employee to a bargaining unit position for which a qualified union employee applied internally would certainly have triggered a grievance.⁵ Clark did not find any open positions to offer to Nelson without undue problems.

50. As an alternative to finding Nelson an appropriate and available open position, Clark attempted to create a new position, within the Fire Department. The proposed position would have had job duties similar to the work Nelson did in her prior position as a personnel technician, but would not have been a human resources (personnel) position.

51. This alternative failed, for two reasons. First, the County Attorney advised against it. Second, Clark, as required, notified the collective bargaining representative for the Fire Department clerical personnel that this new position was being created as a nonunion position, and the union objected, asserting jurisdiction over the new position. At that point, the Director of Fire Services decided not to continue with creation of the position because of concern that it would strain relations between Fire Department management and the union.

52. Unable to find a position into which he could place Nelson, Clark never contacted Nelson about any of the positions he considered. Understandably, Nelson did not herself contact Clark or otherwise seek other employment within BSB while on paid administrative leave.

53. On October 2, 2007, after providing Nelson with almost three months of paid administrative leave, BSB elected to terminate her effective October 19, 2007, and gave Nelson written two weeks notice of her termination. BSB terminated Nelson's employment because no position into she could be placed had been found. This was the real reason for her termination. The reason given was not a pretext for a retaliatory discharge.

⁵ Clark testified about one specific instance involving an "administrative support office manager" position at Metro Sewer. His testimony implied that he looked at but was unable to offer Nelson other positions as well because of the internal posting requirement.

54. On October 16, 2007, Nelson's attorney timely sent Clark, Nelson's immediate supervisor, a formal grievance letter challenging her termination and requesting reinstatement. On October 22, 2007, Clark responded by letter, addressing the reasons for her termination, without express reference to the grievance procedure. On October 30, 2007, Nelson's attorney sent a letter to Babb. That letter asserted that the letters of October 16 and 22 had completed the first step of BSB's grievance policy, and stated that the current letter was Nelson's initiation of the second step for the grievance, submission to the Chief Executive.

55. On November 9, 2007, Babb responded by letter to Nelson's attorney, completing the second step of the grievance procedure by affirming Clark's "decision in Step 1" (referring to Clark's letter of October 22, 2007).

56. On November 26, 2007, Nelson's attorney sent a letter to the Chairman of BSB's Council of Commissioners, requesting referral of her grievance to the Problem Resolution Review Committee (PRRC) for investigation and resolution, thereby completing the third step of the grievance procedure.

57. The fourth step of the grievance procedure was for the grievant and BSB each to select a BSB employee to serve as a member of the PRRC, and for the Chairman of the Personnel Committee or his designee to chair the PRRC as its third member. To complete step four, the PRRC would "conduct a hearing" and submit a written report to the Chairman of the Council of Commissioners within 45 days after receipt of the "appeal," which appears to mean within 45 days after BSB's receipt of Nelson's attorney's November 26, 2007, letter.

58. Had the PRRC "hearing" been held, the PRRC had the power to accept or to reject, in whole or in part, the recommendations of the Chief Executive, apparently being the second step response to the grievance. The PRRC had the power to formalize its own resolution to the dispute within the "written laws, rules and personnel policies or procedures" of BSB. The PRRC "hearing" and the subsequent PRRC decision (step four in the grievance procedure) comprised the final step in BSB's grievance procedure.

59. BSB never selected an employee to serve as a member of the PRRC for Nelson's grievance. The fourth step of the grievance procedure was never completed. As already noted (*see* Finding No. 43), failure of BSB timely to respond to any step in the grievance procedure entitled the grievant to proceed to the next step. For any grievance that went through all four steps to a PRRC decision, the grievance procedure expressly stated that the PRRC decision was final, ending the employee's grievance process. Since there was no further step to the grievance procedure, there was no further procedure for Nelson to invoke when BSB "missed" the fourth step.

60. The grievance procedure appeared to leave BSB as well as the grievant with no further recourse after step four to implementing the PRRC decision. The Hearing Officer uses “appeared,” because it is possible that the PRRC procedure was intended to empower BSB to reject a PRRC decision if BSB unilaterally decided the decision was inconsistent with “written laws, rules and personnel policies or procedures.”

61. The grievance procedure included a statement that it did not preclude “statutorily-protected” rights to file discrimination claims with federal and state enforcement agencies. Thus, Nelson had nothing to lose, in terms of any preclusion of her present claim, by proceeding through the PRRC process. She would have had the opportunity to ask the PRRC for, and perhaps to obtain from it, a decision mandating her reinstatement, with which BSB may have been required to comply (subject to the uncertainty mentioned in the last sentence of Finding No. 60).

62. BSB was unwilling to proceed with the PRRC step because the nature of this particular process had become different from what Clark had contemplated when he created the PRRC procedure. BSB had never held a PRRC hearing. Once before Nelson’s grievance the fourth step procedure had been invoked, in a grievance settled before the PRRC hearing occurred.⁶

63. In writing the PRRC procedure, Clark intended it to be an informal internal dispute resolution method. He intended to serve BSB’s representative on each PRRC committee, and had never trained any other BSB employee to act as BSB’s PRRC member. He had never considered that a grievance against him would make it necessary for some other BSB employee to serve on the PRRC for that grievance. He had never considered that a grievant with an attorney might force more formality into the PRRC procedure than Clark had intended. BSB’s business reasons for “missing” the fourth step of the grievance procedure for Nelson’s grievance were unrelated to both the identity of the grievant and the nature of the grievance. The unforeseen events of having the informal internal dispute resolution procedure veer toward becoming a formal and adversarial hearing with Clark unable to participate for BSB could have arisen any time a grievant whose grievance was against Clark obtained counsel before or during step four.

64. BSB’s decision to “miss” the fourth step of Nelson’s grievance may not have been a wise or even a proper decision – the application of labor law to such conduct by an employer is not within the scope of this case. The substantial and

⁶ Clark testified that Nelson was the first employee to invoke the PRRC procedure, then BSB submitted his post hearing affidavit documenting one prior invocation of the procedure (that did not result in a hearing), which he indicated he had forgotten while testifying at the hearing.

credible evidence of record established that BSB chose to “miss” the fourth step of the grievance procedure on Nelson’s October 16, 2007, grievance for legitimate nondiscriminatory reasons worthy of credence.

IV. DISCUSSION⁷

Discussion of the Decision

This case involves the end of Charging Party Jocelyn Nelson’s career in personnel work for Respondent City and County of Butte-Silver Bow, her employer. Loss of her particular position resulted from BSB’s discovery of her poor judgment in inappropriately using its electronic communication systems, and even poorer judgment in making a comment in her inappropriate electronic communications that suggested she was willing to use confidential personnel information as ammunition in an ongoing quarrel with at least one coworker.

As often occurs, the Hearing Officer must choose between two scenarios, both of which are possible from the facts adduced at hearing. On one hand, it is possible that the contents of the Personnel Plus! report raised BSB concerns that Nelson might pursue charges of discrimination beyond internal channels. It is possible that Clark blamed Nelson for her complaints about conflicts with BSB Employee No. 1 and wanted to retaliate because her opposition to BSB Employee No. 1’s hostility created problems for BSB. It is possible that Clark prompted BSB to look for a basis to discharge Nelson before she gained access to the Personnel Plus! report. It is possible that the discovery of the electronic messages provided Clark with such a basis, making possible a retaliatory course of disciplinary action that led to her firing.

On the other hand, it is also possible that Clark and BSB undertook good faith attempts to improve the situation between Nelson and BSB Employee No. 1. It is possible that during those attempts, BSB found out about the misuse of BSB’s electronic messaging by Nelson and BSB Employee No. 2. It is possible that one of the many inappropriate messages authored by Nelson caused Clark to distrust Nelson, and for that nondiscriminatory business reason to remove her from her position in Human Resources. It is possible that BSB then pursued a reasonable course of action to discipline both employees involved in the text and e-mail misuse. It is possible that BSB, after a genuine effort to find Nelson another position, discharged her for legitimate business purposes when no such position was found.

Although both scenarios are possible, the Hearing Officer has ultimately found it is more likely than not that the second scenario is what actually happened.

⁷ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Hoffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

When there is no direct evidence of discrimination, Montana applies the three-tier burden shifting analysis found in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 328, 912 P.2d 787, 792. There is no credible direct evidence that BSB imposed more severe discipline against Nelson because of her internal complaints about BSB Employee No. 1. Therefore, the three tier *McDonnell Douglas* analysis applies.

In the first tier of *McDonnell Douglas*, Nelson had to prove that: (1) she engaged in activities protected by the Human Rights Act; (2) BSB subjected her to significant adverse acts and (3) there was a causal connection between the adverse acts and her protected activities. Mont. Code Ann. 24.9.603(1).

“Protected activities” include opposition to discriminatory practices that the Act forbids. Mont. Code Ann. § 49-2-301; Admin. R. Mont. 24.9.603(1)(b). The Act prohibits sexual harassment and creation of a hostile work environment because of sex. Mont. Code Ann. § 49-2-303(1)(a); *see, Shields v. Helena S.D. No. 1* (1997), 284 Mont. 138, 943 P2d 999, *following Harrison v. Chance* (1990), 244 Mont. 215, 797 P2d 200. Making a reasonable internal complaint about a co-worker’s conduct, when that conduct could amount to either sexual harassment or creation of a hostile work environment because of sex, is opposing a practice the Act forbids. Nelson established the first element of her *prima facie* case.

Suspending Nelson without pay, deciding that she could not return to her assigned position and ultimately discharging her after not finding her another position were significant adverse actions. Admin. R. Mont. 24.9.603(2)(b). Nelson established the second element of her *prima facie* case.

BSB Employee No. 2 who, with Nelson, violated BSB’s e-mail and text message policies, was returned to his pre-suspension job, with some changes in job duties and supervision. Nelson was not returned to her pre-suspension job and was later discharged. On its face, the treatment of BSB Employee No. 2 was significantly less harsh than the treatment of Nelson, the employee who had complained of another employee’s creation of a hostile work environment because of sex. Also, all of the adverse actions taken against Nelson occurred less than four months after her complaint about BSB Employee No. 1’s signs and less than a month after Personnel Plus! provided BSB with its report. BSB decided upon the adverse actions it would take on the same day that Nelson made her most recent inquiry about that report. Nelson established the third element of her *prima facie* case.

It should be noted in this respect that the disputable presumption of retaliatory intent created by Admin. R. Mont. 24.9.603(3) applies only to adverse acts taken while or within six months after the person alleging retaliation had pending before the department, the Human Rights Commission or a court a claim of

illegal discrimination. The proximity in time between BSB's adverse actions and Nelson's opposition to illegal discrimination gives rise to an evidentiary disputable presumption of retaliatory intent that arises from the facts, not from the regulation.⁸ By itself, that evidentiary presumption might not have been enough, but taken together with BSB's harsher treatment of her than of BSB Employee No. 2, it did establish the third element of her *prima facie* case.

In the second tier of *McDonnell Douglas*, BSB had the burden to respond to Nelson's *prima facie* case by showing a legitimate business purpose for taking harsher actions against Nelson than against the other employee who engaged in the same conduct vis-a-vis the e-mail and text mail policies. *McDonnell Douglas* places this burden upon the respondent for two reasons:

[It] meet[s] the plaintiff's *prima facie* case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Comm. Aff. v. Burdine (1981), 450 U.S. 248, 255-56, *see also Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 212.

BSB suspended BSB Employee No. 2 and Nelson without pay for four days each – initial equal treatment of both employees for their misuse of BSB's business e-mail and text messaging capacities.

BSB returned BSB Employee No. 2 to his previous position, without formal removal of his supervisory functions. BSB did restructure his job and increase his supervision after returning him to his position, thus following most of the recommendations of BSB's private law firm. With Nelson, BSB took the actions recommended by its private law firm, refusing to return her to her position and making an effort to find her another position.

BSB met its burden to show a legitimate nondiscriminatory business reason for permanent removal of Nelson from her personnel tech position. Its evidence established that Nelson's electronic communications included a statement reasonably interpreted at the very least to indicate her willingness to use confidential personnel information against BSB Employee No. 1, and perhaps others. Clark's testimony

⁸ Adverse action soon after protected activity is evidence that can support a finding of retaliatory motive, even without the administrative rule. *Love v. ReMax of America* (10th Cir. 1984), 738 F.2d 383, 386, "The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action," *quoting Burrus v. United Telephone Co.* (10th Cir. 1982), 683 F.2d 339, 343, *cert. den.*, 459 U.S. 1071.

that he was unwilling to return Nelson to her personnel position because of concern about her possible misuse of confidential information was credible. Thus, the harsher initial post suspension treatment of Nelson was reasonable, given BSB's additional concerns about her.

In this regard, the expert testimony of Linda Brown was interesting but not necessary to decide that Clark's explanation of his decision not to return Nelson to her position was both credible and reasonable. Brown cited a professional code of ethics that she believed supported Clark's decision, of which Clark apparently was unaware. She agreed with Clark, relying in part upon her own experience and education, but also appealing to authority – the ethics code. In deciding that Clark acted reasonably in removing Nelson from her position, the Hearing Officer relied upon the factual evidence rather than Brown's opinion testimony or cited authority.

Clark relied upon his years of experience in personnel work in forming the opinion that he could not trust Nelson to maintain the requisite confidentiality for personnel records. Experience can be a better basis for an opinion than knowledge of applicable principles (authority). The holding of *Berry v. City of Detroit* (1994), 25 F.3d 1342, is largely irrelevant here, however, the reasoning regarding the value of experience to support an opinion is useful:

. . . . [I]f one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper . . . with no scientific training at all . . . does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Berry at 1349-50.

Thirty years of personnel work, not an expert opinion, lent credence to Clark's conclusion that he could no longer entrust confidential personnel information to Nelson. Although the motion to strike Brown's testimony is denied, as discussed later in this decision, striking it would not change the decision.

The further and final question of BSB's reasonableness is whether BSB made a good faith effort to find another position for Nelson during her administrative leave.

This question is fact-based and also rests upon the credibility of Clark, who provided essentially all the evidence regarding the search for another job for Nelson. Factually, Clark's explanation of the union-related problems of placing Nelson in an existing or newly created clerical position outside of personnel was entirely credible. Nelson did not challenge any of the facts cited by Clark, instead presenting evidence that BSB had been able to place other displaced employees in the past. There was no evidence that Clark had tried harder or longer to accomplish those other placements, which involved different fact scenarios necessitating the placement efforts in each instance. Nelson, despite able efforts by her counsel, did not successfully impeach Clark's credible testimony of his placement efforts in this case.

BSB produced a legitimate business reason for the entirety of the differential treatment Nelson received. In the third and final tier of *McDonnell Douglas*, Nelson then had the burden of proving pretext. *McDonnell Douglas* at 802; *see also Martinez v. Yellowstone Co. Welf. Dept.* (1981), 192 Mont. 42, 626 P.2d 242, 246. To meet this third tier burden, Nelson could present either direct or indirect proof of the pretextual nature of BSB's proffered reasons:

She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine at 256.

The Montana Supreme Court characterized this third tier burden as requiring proof, by a preponderance of the evidence, "that the reasons for adverse action offered by the defendant were not true, but, rather, a pretext for discrimination." *Ray v. Mont. Tech.*, 2007 MT 21, ¶31, 335 Mont. 367, 152 P.3d 122 (and cases therein cited).

Nelson argued persuasively that BSB had presented no evidence that she ever had inappropriately used confidential personnel information. This was true, but did not meet the merits of Clark's concern. Nelson never had violated the confidentiality of the employee records with which she worked, yet her "ammo" comment suggested that she was ready, willing and perhaps even eager to do so. This justified Clark's loss of trust in her, necessitating her removal from personnel work. Nelson did not adduce evidence showing that Clark's testimony of his distrust of Nelson was untrue. She likewise did not establish that his distrust was unworthy of credence.

In post hearing submissions, Nelson argued effectively that several alternative reasons proffered by BSB for removing Nelson from her current position were, based upon the facts, insubstantial and unconvincing.

For example, Nelson did sign an applicant's name to that person's employment application to BSB (with authorization from the applicant). The evidence did not establish that doing so was either a forgery or a deceitful departure from proper personnel practices. The e-mail by which the applicant authorized Nelson to sign his name to the application was in the same BSB file as the application, apparently because Nelson provided the printout of the e-mail with the application. BSB's alternative explanation for how the e-mail appeared in the file containing the application was that Nelson later surreptitiously put it into the file to cover her tracks. This explanation was well argued but insufficiently supported with evidence. The Hearing Officer did not give any weight to this alternative basis for distrusting Nelson and removing her from her current position, and would not have given any weight to the evidence even without the post hearing offer and acceptance of deposition testimony from Deputy County Attorney Joyce that Nelson signing the applicant's name with the applicant's authority was not a forgery.

Similarly, BSB's presented testimony that Nelson's inappropriate use of BSB's e-mail system disqualified her from working as a personnel technician because she could not credibly counsel other employees about such policies. This evidence was unpersuasive, because of the absence of stronger evidence that such counseling of other employees was an integral part of her job duties, rather than a line in a job description referring to work she had never actually done. The "higher standard" evidence presented by BSB in this context was singularly weak and did not justify the differential discipline of Nelson.

The evidence that Nelson was behind in her work was sufficient to justify Clark's directive to her on June 29, 2007, to use her own time to prepare further complaints against BSB Employee No. 1 so long as she was behind in her work. It was entirely insufficient to justify ending her career in personnel work.

Reasons presented part way through the complaint process by an employer who had presented and then abandoned other reasons can be a basis for finding pretext. *Holland v. Washington Homes, Inc.* (4th Cir. 2007), 487 F.3d 208, 217, n. 7; *Hernandez v. Hughes Missile Systems Co.* (9th Cir, 2004), 362 F.3d 564, 569; *Thurman v. Yellow Freight Sys., Inc.* (6th Cir. 1996), 90 F.3d 1160, 1167. The shifting justification permits the inference of pretext, but does not require it.

An employer's explanation for adverse action can be true, but still unworthy of credence as justification for the adverse action. In such an instance, the true but insufficient reason for the adverse action is "merely a consideration that the fact finder may utilize to infer that the explanation is a pretext for discrimination." *Beaver v. D.N.R.C.*, 2003 MT 287, ¶62, 318 Mont. 35, 78 P.3d 857 (original emphasis deleted), *citing* *Reeves v. Sanderson Plumbing Products, Inc.* (2000), 530 U.S. 133, 143. "That a trial court may find the defendant's proffered

explanation unworthy of credence is, therefore, not conclusive evidence that the reasons given are a pretext for an unlawful discriminatory reason.” *Beaver*.

Nelson always bore the ultimate burden of persuading the fact finder that BSB illegally retaliated against her. *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 818; *Johnson, op. cit.*, 734 P.2d at 213. Putting this ultimate burden in the context of the present case, assume for the sake of analysis that Clark had justified his decision to remove Nelson from her then current position for any or all of BSB’s additional reasons, but not because of his concern that she was capable of improperly using confidential information. Without that concern, all of BSB’s reasons would have been insufficient and, taken as a whole, unconvincing. In that case, the lack of any adequate reason aside from retaliatory animus might very well have resulted in a decision that BSB’s reasons were pretextual.

Instead, BSB’s key reason for Nelson’s removal from her job never shifted. Rather than dropping its original justification in favor of others presented later, BSB adduced additional defenses, maintaining its original justification throughout the process. That Clark’s loss of trust in Nelson was the key component in the original decision-making by BSB was fully apparent from both Clark’s testimony and the contemporaneous documents in evidence. Clark truly had lost trust in Nelson.

Discrimination cases are always fact intensive. The Hearing Officer was persuaded that Clark’s basis for Nelson’s removal, the concern triggered by the “ammo” e-mail, was a true concern worthy of credence. That the other justifications presented would not themselves have been worthy of credence does not require the Hearing Officer to consider the credible and legitimate reason BSB always offered as now being tainted by the alternative insufficient justifications also presented.

It would be manifestly unfair in this case to reject a proven legitimate business reason because other legitimate business reasons were proffered but either not proved or not worthy of credence. That would mean that BSB had to prove every proffered legitimate business reason or lose the case, even if one of its proffered legitimate business reasons was both true and worthy of credence. The other reasons proffered by BSB may not have been sufficient, but they did not necessarily thereby render the entirety of the defense case pretextual.

The precise same analysis applies to Nelson’s claims (if such claims could properly be presented here) of discriminatory harsher treatment because of sex. The precise same result is reached. BSB produced a legitimate business reason for the entirety of the differential treatment Nelson received, whether that differential treatment is alleged to be retaliatory or alleged to be discriminatory because of sex.

Some Questions Not Answered

The Hearing Officer had to decide this case on the facts presented. There are a number of questions that the evidence did not answer.

For example, Nelson argued that the substance of the Personnel Plus! report supported her testimony that BSB Employee No. 1's conduct toward her amounted to sexual harassment or created a hostile working environment. She argued that the report proved that she had complained of that conduct before the March 2007 incident. She used the substance of the report to argue that BSB Employee No. 1's punishment (documented counseling) for his March 2007 conduct was "standard" for prolonged conduct constituting sexual harassment and creating hostile work environment, which meant that her much harsher punishment for text and e-mail misuse was unjustifiable.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mont. R. Ev. 801(c). Nelson's offer of the Personnel Plus! report, as evidence to prove the truth of the matters stated in that document, authored by two persons who did not testify at hearing, was properly refused as hearsay.

On the other hand, the report was admissible to prove that it had been received by BSB, that its contents were known to BSB before adverse actions were taken against Nelson, and that BSB could have been concerned that its adverse actions could be seen as arising out of a retaliatory motive, all based upon what was in the report. The Hearing Officer specifically admitted the Personnel Plus! report for these limited purposes, argued strongly by Nelson as evidence supporting her retaliation claim.

A document admitted for one purpose but not for another can only be used for the limited purpose for which it is properly admitted. Mont. R. Evid. 105. Offered to prove that BSB had received the report, had knowledge of its contents, and could have taken subsequent adverse actions because of its knowledge of the contents, the Personnel Plus! report was admissible. It was admissible because its contents could tend to make it more probable that BSB did retaliate against Nelson for seeking the report as part of her opposition to discriminatory practices forbidden by the Human Rights Act. It was not admissible to prove the truth of the matters stated therein, and therefore could not prove what the report said that BSB Employee No. 1, Nelson or BSB did or did not do.

Without the content of the report as substantive evidence on the point, Nelson did not prove that BSB Employee No. 1 engaged in the long-term sexual harassment/hostile environment conduct to which a written warning might have been

an inadequate response. Her own testimony was at best equivocal about what had transpired with BSB Employee No. 1 before the sign incident in March 2007 (*see* Finding No. 4). Without such proof, BSB Employee No. 1's conduct in posting the offensive signs and responding hostilely to Nelson's polite request to remove them, standing alone, was not comparable to the text and e-mail misuse in which Nelson and BSB Employee No. 2 engaged, or to Nelson's "ammo" comment in that misuse.

For a second example, BSB argued that Nelson's March 13, 2007, e-mail to BSB Employee No. 1 was a deliberate provocation, intended to goad the recipient into a confrontation. Clark's prior directive against communicating with BSB Employee No. 1 by e-mail did not support this argument. There was very little evidence about what led Clark to issue the directive, except that he thought e-mail exchanges were exacerbating the conflict. The directive may not have been in force at the time of this e-mail. BSB's argument was consistent with the e-mail Nelson sent to BSB Employee No. 2 on March 2, 2007, stating that she "prepared to conduct war" with BSB Employee No. 1. However, BSB did not provide sufficient evidence to support an inference that Nelson's courteous and appropriate e-mail request to BSB Employee No. 1 was sent with a malign motive. Thus, there is no finding regarding Nelson's alleged ulterior motive in sending the March 2 e-mail.

For a third example, evidence was lacking about how BSB heard about "several incidents of e-mail and cell phone abuse," whether it actually followed through with periodic spot checks for such abuse and why BSB Employee No. 2 and Nelson were selected as the starting point for investigation into such abuse. It is possible that BSB singled out Nelson and BSB Employee No. 2 for scrutiny, but the evidence adduced did not establish that it was more likely than not that BSB did so.

For yet a fourth example, what Nelson meant by her "ammo" statement remains a matter for conjecture. BSB never asked her what she meant, and she did not offer an explanation of the statement at hearing. The Hearing Officer cannot properly speculate about: (1) what she might have meant, nor (2) what she would have told Clark if he had asked her what she meant, nor (3) whether Clark would still reasonably have doubted her trustworthiness had she answered the question he did not ask. Relying upon the evidence rather than such conjectures, Clark's concerns were reasonable and his failure to find out what Nelson might have said that her "ammo" statement meant did not render his concerns unworthy of credence.

For still another example, the private law firm's recommendations to BSB about Nelson and BSB Employee No. 2 seemed in part to result from its reading of the text and e-mail messages to show or at least strongly to suggest that Nelson and BSB Employee No. 2 were having "what appears to have been a consensual sexual affair." Although the text and e-mail messages included flirtatious and suggestive

comments, the content of messages, standing alone, did not prove that it was more likely than not the two were having an affair. BSB made no effort to prove such an affair at hearing. Clark did not base his decision to remove Nelson from her job on speculation that she was having an affair with BSB Employee No. 2. Whether there was such an affair is not addressed in the findings, since the answer to that question was not necessary to decide this case.

Finally, the Hearing Officer has not decided whether people who work with confidential personnel information are generally held to a "higher standard" of conduct than other employees. BSB Employee No. 2's messages to Nelson did not include a comment that he had "ammo" (in a context suggesting that "ammo" meant confidential business development information) which he looked forward to using for personal purposes. Had there been such a comment, Babb might reasonably have begun to doubt BSB Employee No. 2's trustworthiness with confidential business development information, and might have refused, for that reason, to return BSB Employee No. 2 to his job, as Clark did with Nelson, without any consideration of a general "higher standard" for persons in BSB Employee No. 2's position.

A bank can and should require its tellers to be trustworthy with money. A demolitions factory can and should require its production workers to be trustworthy with high explosives. A personnel department can and should require its technicians to be trustworthy with other people's potentially explosive confidential personnel information. It does not follow that people working in any of the three jobs can always be held to an across the board "higher standard" of conduct.

Clark (as well as Brown) testified that a "higher standard" of conduct for personnel employees (including technicians) applied to a broad range of conduct – essentially to compliance with the entirety of the employer's policies and procedures. What the Hearing Officer instead found was that a very mundane standard of conduct with regard to confidential personnel matters – being above question regarding maintenance of confidentiality – was an appropriate job requirement for personnel employees (including technicians). It was not a "higher standard." It was a particular strict requirement for working with confidential personnel information, comparable to a strict requirement for following procedure in handling money in the bank or handling high explosives in a dynamite factory.

Not every violation of any employer policy or procedure would justify removing a teller, a demolitions worker or a personnel technician from their respective jobs. A particular violation of policy or procedure calling into question a particular employee's trustworthiness to obey strict requirements necessary in working with money in a bank, high explosives in a factory or confidential personnel information in a Human Resources Department might justify removal of that

employee from any such particular position. Applying a generalized “higher standard” analysis in this case was unnecessary. Establishing such a generalized standard for personnel technicians could be confusing, if not misleading, in any case.

Motions to Strike and Continuing Objections

Nelson moved to strike Brown’s expert testimony. An expert cannot serve as an advocate for an outcome, only as an aid to the fact finder’s understanding. An expert cannot testify that the facts prove discrimination, *see Kizer v. Semitool, Inc.* (1991), 251 Mont. 199, 824 P.2d 229; *Heltborg v. Modern Mach., Inc.* (1990), 244 Mont. 24, 795 P.2d 954; *see also Mahan v. Cenex* (1989), 235 Mont. 410, 768 P.2d 850; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813; *Hart-Anderson v. Hauck* (1988), 230 Mont. 63, 748 P.2d 937. Similarly, Brown could not properly testify that in her review of the this case, based on her long experience in personnel work, she did not find anything that gave her pause in advising that there had not been discrimination. For these reasons, some of Brown’s opinion testimony was refused on a sustained objection.

Brown’s expertise in personnel matters is clear. Except for the sustained objections, much of her testimony although admissible, was couched in terms of the inapplicable “higher standard” analysis as already discussed. Expert testimony can be admissible but not useful. The fact finder decides the utility of expert testimony. *Jacques v. Mont. National Guard* (1982), 199 Mont. 493, 649 P.2d 1319, 1323:

In *Tompkins v. Northwestern Union Trust Co. of Helena, Montana* (1982), Mont., 645 P.2d 402, 408, 39 St.Rep. 845, 853, we stated that: “The jury can choose to adopt the testimony offered by one side to the exclusion of the other. The jury is free to disregard all of the expert testimony.” In most cases, expert testimony does not mandate a result because, by its nature, expert testimony deals with opinion evidence. Irrefutable facts need not be established, and most likely would not be established, through offering expert opinion.

After extended discussion of decisions from other jurisdictions, our Court held:

We think expert testimony offered by defendant, though unrefuted except for impeachment, does not compel or mandate a result for defendant. The jury should be free to weigh that testimony and should be able to accept or reject it.

Id. at 1325; *see also, Magart v. Schank*, ¶10, 2000 MT 279, 302 Mont. 151, 13 P.3d 390 (a jury may not disregard uncontradicted, credible lay testimony, but may disregard expert testimony it finds unpersuasive).

Obviously, the Hearing Officer, when acting as the fact finder, can find Brown's expert testimony, in evidence, unpersuasive or not helpful, and has found it so in this case. It does not follow that the testimony must or ought to be struck from the record. Therefore, the motion to strike is denied.

BSB objected to and moved to strike the punitive damage claim. That motion is moot in light of the decision, and is therefore denied.

The Hearing Officer at hearing denied BSB's motion to strike the medical evidence and the damages testimony of Nelson regarding her physical and emotional condition and to dismiss her claims to certain damages. Revisiting that ruling is unnecessary in light of the decision, which renders the ruling moot.

Likewise, BSB's motion to strike Nelson's testimony and that of Clark regarding the value of her benefits (in light of general information about the value of benefits to non-union employees of BSB generally) was denied at hearing, is moot in light of the decision, and need not be revisited.

V. PROTECTIVE ORDER

Nelson did not effectively assert and preserve her privacy rights regarding the information in this record. Another individual who authorized Nelson to sign his name on his application for employment with BSB might have potential privacy rights, but those rights do not clearly outweigh the right of the public to know the facts (pertinent to his privacy) upon which this decision is based. Although his name is not important for the decision itself, it is in the public record already and his privacy interests, like Nelson's, are not protected by this order.

The sealed portions of the record pertain to privacy rights of two persons – BSB Employee Nos. 1 and 2. To determine what portions, if any, of the record remain sealed, the Hearing Officer must first decide whether these two employees have subjective or actual expectations of privacy that society recognizes as reasonable. *Havre Daily News LLC v. City of Havre*, ¶23, 2006 MT 215, 333 Mont. 331, 142 P.3d 864; *Jefferson County v. Montana Standard* (2003) ¶15, 2003 MT 304, 318 Mont. 173, 79 P. 3d 805; *Lincoln County Commission v. Nixon* (1998), ¶16, 1998 MT 298, 292 Mont. 42, 968 P.2d 1141; *Bozeman Daily Chronicle v. B.C.P.D.* (1993), 260 Mont. 218, 859 P.2d 435, 439; *Mont. H. R. Div. v. City of Billings* (1982), 199 Mont. 434, 649 P.2d 1283, 1287.

If either or both individuals have privacy rights pursuant to the above two part test, the final question is whether their privacy rights clearly outweigh the public's right to know the basis of this decision. Resolving the conflict between the public's right to know and the individual's right to privacy requires the department "to

balance the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know may outweigh the right of individual privacy, depending on the facts.” *Missoulain v. Board of Regents* (1984), 207 Mont. 513, 675 P.2d 962, 971 (original emphasis).

The administrative forum holding contested case proceedings often is the only realistic forum in which to undertake such reviews and provide due process, *cf.*, *City of Billings Police Dep't v. Owen*, ¶30, 2006 MT 16, 331 Mont. 10, 127 P.3d 1044, and that is the situation in this case.

Both BSB Employee No. 1 and No. 2 have objected to the disclosure of their personnel records. Thus, they asserted actual as well as subjective expectations of privacy. The reasonableness of those expectations of privacy may be illuminated by an inquiry into:

(1) attributes of the individual, including whether the individual is a victim, witness, or accused and whether the individual holds a position of public trust (internal citations omitted); (2) the particular characteristics of the discrete piece of information and (3) the relationship of that information to the public duties of the individual.

Havre Daily News, ¶23.

Both individuals were public employees. BSB Employee No. 1 did not hold a position of great public trust. He was simply a technician in the payroll department. Had the Hearing Officer adopted the “higher standard” that BSB advocated for personnel technicians, that same “higher standard” might also have applied to payroll technicians, which might have changed this analysis. As it stands, society is willing to recognize BSB Employee No. 1's expectations of privacy as reasonable. The sealed information related, but only in a peripheral sense, to his public duties. Directly disclosing his identity by unsealing the protected portions of the record would violate his reasonable actual and subjective expectations of privacy in his personnel records.

On the other hand, BSB Employee No. 2 held a position of great trust vis-a-vis the business operations of BSB. He participated in deliberate and repeated violations of BSB's electronic communications policies. The sealed information related sufficiently to his public duties to call into question his fitness to continue in his position without at least closer supervision, as reflected in BSB's treatment of him after discovery of his misuse of its electronic communications. Society is not willing to recognize his privacy rights in his own misconduct.

It is important to remember that Article II, Section 9, Mont. Constitution 1972, favors disclosure, limiting disclosure only when the demand of individual privacy *clearly* exceeds the merits of disclosure. "It is the party asserting individual privacy rights [who has] the burden of establishing that those privacy rights clearly exceed the merits of public disclosure." *In Matter of T.L.S.*, ¶31, 2006 MT 262, 334 Mont. 146, 144 P.3d 818; *Bozeman Daily Chronicle*, 859 P.2d at 441; *Worden v. Montana Bd. of P.&P.* (1998), ¶¶31-32, 289 Mont. 459, 962 P.2d 1157.

The public's right to know is not unfettered. It reaches its limits when the press invades an individual's dignity. Tr. of the Montana Constitutional Convention Vol. 5 p. 1673-1674. The function of the free press is to be "a watch guard on the activity of government and, second to make sure that the rights of the individual citizen of a free democracy are protected" – the public's right to know is for the benefit of the people and not for the press "to sell newspapers." Tr. at p. 1673. Here, the purposes and merits of the public's right to know the particulars of the conduct of BSB Employee No. 2 involves what is arguably the most important aspect of a free press - being a watchdog over our government to ensure its actions conform to the principles of a free democracy. *See also New York Times Co. v. United States* (1971), 403 U.S. 713, 717. With regard to BSB Employee No.1, when disclosure is not in furtherance of the watch guard function and simply invades an individual's dignity, the demand of individual privacy clearly exceeds the merits of disclosure. *See Missoulian*, 675 P.2d at 972.

BSB Employee No. 1's privacy demand, recognized by society as reasonable, clearly outweighs the right of the public to know his identity in connection with his disputes with Nelson and the discipline to which he was subjected. On the other hand, BSB Employee No. 2 has not established that his privacy demands, even if society were to recognize them as reasonable (which society does not), clearly outweigh the public's right to know the basis of this decision, in detail. Therefore, those portions of the sealed record relating solely to protection of the privacy demands of BSB Employee No. 2 are now designated to be unsealed in accord with this decision and the accompanying order.

The unsealing mandated by this protective order is delayed for 45 days. This gives BSB Employee No. 2 an opportunity to challenge this decision before its implementation moots any challenge. *Billings H. Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 329, 335 Mont. 94, 149 P.3d 565. If no order is in place at the end of the 45 day period delaying implementation of the unsealing, the Hearings Bureau will send to the parties and make generally available a revised decision, differing from this decision only in replacing "BSB Employee No. 2" with the name of the individual, through the decision. The other provisions of this decision regarding unsealing can

be implemented by whatever body, judicial or administrative, is in possession of the record at the time of unsealing.

The Hearing Officer has considered various methods of protecting the legitimate privacy interests of BSB Employee No. 1. Because the sealing of the record was done “on the fly,” during the course of the hearing, the unsealed portions of the record may themselves allow some surmises about who this individual is. Nonetheless, the Hearing Officer must do the best he can to protect the actual identity of BSB Employee No. 1. Ultimately the best way to protect his privacy interests, given the material already in the public record, is to maintain the currently sealed portions of the record that protect his identity. The Hearing Officer therefore concludes that this protective order, rather than any redaction scheme, is most effective for the protection of the privacy of BSB Employee No. 1, together with redactions of portions of the sealed record which are now unsealed.

For all these reasons, the following portions of the sealed record are unsealed effective the 45th calendar day after this decision issues: Page 343, line 14 through page 345, line 5; page 375, line 19, through page 386, line 23; page 414, line 23, through page 416, line 20; page 485, line 1, through page 487, line 15; page 556, line 10, through page 562, line 3; page 568, line 20, through page 570, line 12; and page 584, line 21, through page 590, line 23. In addition, the following exhibits are unsealed: Exhibits 5, 20, 139 and 140 (exhibits 139 and 140 have been redacted to remove references by name to BSB Employee No. 1, and e-mail and identity information about third parties), to be unsealed on the effective date of this provision unless it is stayed – **a sealed and unredacted copy remains sealed** in the file after implementation of this protective order).

The remaining portions of the sealed record remain sealed: Page 31, line 21, through page 51, line 20; page 209, line 18 through page 212, line 23; page 345, line 6, through page 352, line 8; page 406, line 8 through page 414, line 22; page 434, line 1 through page 442, line 6; page 526, line 18, through page 535, line 22; page 539, line 20, through page 552, line 23; and page 574, line 11, through page 578, line 10. In addition, the following exhibits remain sealed, because of references to BSB Employee No. 1 therein: Exhibits 1, 9, 10, 17, 19 and 32.

VI. CONCLUSIONS OF LAW


1. The Department of Labor and Industry has jurisdiction over this case, pursuant to Mont. Code Ann. § 49-2-512(1) (2007).

2. The City and County of Butte-Silver Bow did not illegally retaliate or discriminate in employment because of sex against Jocelyn Nelson as alleged in her complaint. Mont. Code Ann. § 49-2-301 and 303.

VII. ORDER

1. Judgment issues in favor of the City and County of Butte-Silver Bow and against Jocelyn Nelson on her charges that BSB retaliated against her for opposing illegal discrimination and discriminated against her in employment because of sex.
2. The Human Rights Act complaint of Jocelyn Nelson against the City and County of Butte-Silver Bow is dismissed.
3. The sealed portions of the record and file, in accord with this order, remain sealed and unavailable to anyone except the parties and their counsel (for purposes only of participating in further proceedings in this case) and any entity exercising jurisdiction over this case or this sealing order, unless and until this order is modified.

Dated: March 18, 2009.


Terry Spear, Hearing Officer
Montana Department of Labor and Industry

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CERTIFICATE OF MAILING

True and correct copies of this document served this date by deposit in the U.S. Mail, postage prepaid, addressed as follows:

PATRICK FLEMING
ATTORNEY AT LAW
PO BOX 527
BUTTE MT 59703-0527

THOMAS WELSCH
ATTORNEY AT LAW
PO BOX 2000
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Certified this 18th day of March, 2009.


Sandra Rubie

COPIES OF THIS DECISION AND OF THE SEALED PAGES OF TESTIMONY AND SEALED EXHIBITS TO BE UNSEALED ARE MAILED ALSO TO THE CURRENT ADDRESS OF BSB EMPLOYEE NO. 2. COPY OF THIS DECISION IS BEING MAILED TO BSB EMPLOYEE NO. 1.

